Toh Seow Ngan & Ors v Toh Seak Keng & Ors

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-142-89
ABDUL HAMID LP, MOHAMED AZMI AND AJAIB SINGH SCJJ
20 APRIL 1990

Civil Procedure — Consent order — Order made without any consent or instruction — Whether party estopped from challenging validity of consent order — Inherent jurisdiction of court — Consent order set aside

In this case, the first respondent was a director and shareholder of the fifth respondent company. He owned 140,000 shares in the company and the appellants who are his mother, wife and three sons, separately owned a total of 250,000 shares in the company. A management dispute arose between the first respondent and the other three directors (second, third and fourth respondents) resulting in his removal as managing director of the company. As a minority shareholder, he filed a petition challenging his removal from office and in the alternative praying for the purchase of his entire 140,000 shares of the company by the other directors at a price to be fixed. When the petition came up for hearing the first respondent was absent. But a consent order was recorded at the behest of counsel of both sides by which it was ordered that two of the co-directors should purchase not only the entire 140,000 shares of the first respondent but also the 250,000 shares registered in the names of the five appellants at the price of $1.90 per share. There was no dispute that the consent order was defective and, as far as the purchase of the appellants' shares was concerned, it was conceded that the said order was made without any consent or instruction. At the hearing, the respondents conceded that when the consent order was made the court had no jurisdiction to make the consent order affecting the rights of the appellants. However, the learned trial judge held the appellants were estopped from challenging the consent order as it had been perfected and there was estoppel by conduct, as the appellants had earlier actively participated in proceedings by the first respondent to set aside the consent order. The appellants appealed.

Held, allowing the appeal:

(1) The defects in the consent order were such that the appellants were entitled to have it set aside ex debito justitiae as far as it affected them. There is no denial that there was breach of the rules of natural justice as the High Court had no jurisdiction to make the consent order affecting the rights of the appellants.

(2) On the facts, the appellants were not estopped from challenging the validity of the consent order.

(3) The order of the High Court should be set aside and substituted with the order that the consent order be set aside so far as it affects or binds the appellants.

[Di dalam kes ini responden pertama ialah pengarah dan pemegang saham di dalam syarikat yang menjadi responden kelima. Ia mempunyai 140,000 saham di dalam syarikat itu dan perayu-perayu iaitu, adik, isteri dan tiga anaknya, mempunyai 250,000 saham di dalam syarikat itu. Pertikaian pengurusan telah timbul antara responden pertama dan tiga pengarah syarikat itu (responden kedua, ketiga dan keempat) dan akhirnya responden pertama telah disingkirkan dari menjadi pengarah pengurus syarikat itu. Sebagai pemegang saham minoriti ia telah memfailkan petisyen mencabar penyingkirannya dari jawatan itu dan sebagai alternatif memohon semua sahamnya dibeli oleh pengarah-pengarah lain dengan harga yang akan ditetapkan. Apabila petisyen itu didengar responden pertama tidak hadir. Walaubagaimanapun suatu perintah persetujuan telah dicatatkan atas permohonan peguam kedua-dua pihak dengan mana telah diperintahkan bahawa dua antara pengarah-pengarah yang lain itu akan membeli bukan sahaja 140,000 saham responden pertama akan tetapi juga 250,000 saham yang didaftar dalam nama lima perayu dengan harga $1.90 satu saham. Hakikat bahawa perintah persetujuan itu adalah cacat tidak dipertikaikan dan berkenaan dengan pembelian saham perayu-perayu pula, akuan dibuat bahawa perintah itu telah dibuat tanpa persetujuan atau arahan daripada mereka. Apabila kes itu dibicarakan pihak responden telah mengaku bahawa apabila perintah persetujuan itu dibuat mahkamah tidak mempunyai bidangkuasa membuat perintah persetujuan itu berhubung dengan hak-hak perayu. Akan tetapi hakim yang arif berpendapat bahawa perayu adalah dihalang daripada mencabar perintah persetujuan itu oleh kerana ia telah dilaksanakan dan terdapat penghalangan berasaskan kelakuan, oleh kerana dikatakan perayu telah bercampurtangan di dalam tindakan yang diambil oleh responden pertama untuk mengenepikan perintah itu. Perayu-perayu telah membuat rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Perayu berhak memohon perintah persetujuan itu diketepikan ex debito justitiae (demi untuk keadilan) setakat mana ia berhubung dengan mereka demi kecacatan di dalam perintah itu. Tidak boleh dinafikan bahawa prinsip keadilan asasi telah dilanggar kerana Mahkamah Tinggi tidak ada bidangkuasa untuk membuat perintah persetujuan itu yang menjejaskan hak-hak perayu.

(2) Memandangkan fakta kes ini, perayu tidak dihalang mencabar kesahan perintah persetujuan itu.

(3) Perintah Mahkamah Tinggi hendaklah diketepikan dan digantikan dengan perintah bahawa perintah persetujuan itu hendaklah diketepikan setakat mana ia menjejas atau mengikat perayu-perayu.]

Cases referred to

1 *Abuakwa* v *Adanse* [1958] AC 95 (distd)
2 *Henderson* v *Henderson* (1843) 3 Hare 100; 67 ER 313 (refd)
3 *Yat Tung Investment Co Ltd* v *Dao Heng Bank Ltd & Anor* [1975] AC 581 (refd)
4 *Wytcherley* v *Andrews* (1871) LR 2 P & D 327 (distd)
5 *Ee Kim Kin* v *Collector of Land Revenue, Alor Gajah* [1967] 2 MLJ 89 (refd)
6 *Isaacs* v *Robertson* [1984] 3 All ER 140 (refd)
7 *Hadkinson* v *Hadkinson* [1952] 2 All ER 567 (refd)

Legislation referred to

Companies Act 1965 s 181
Rules of the High Court 1980 O 18 r 19

Loh Siew Cheang for the appellants.
S Selvarajah for the respondents.

Cur Adv Vult

Mohamed Azmi SCJ (delivering the judgment of the court): Toh Seak Keng, the first respondent/petitioner was a director and shareholder of the fifth respondent company (Yew Lee Feedmill Sdn Bhd). Apart from 140,000

shares registered in his name, the present appellants, namely, his brother, wife and three sons separately owned a total of 250,000 shares in the company. A management dispute arose between Toh and the other three directors (second, third and fourth respondents) resulting in his removal as managing director of the company. As a minority shareholder, he filed an Originating Petition No C2 of 1982 in the Kuala Lumpur High Court under s 181 of the Companies Act 1965, challenging his removal from office, and in the alternative praying for the purchase of his entire 140,000 shares of the company by the other directors at a price to be fixed.

On 3 October 1983, Toh was absent when his petition came up for hearing. But a consent order was apparently recorded at the behest of counsel of both sides by which it was ordered that two of the co-directors should purchase not only Toh's entire 140,000 shares but also the 250,000 shares registered in the names of the present five appellants at a price of $1.90 per share.

There is no dispute that the consent order is defective, and as far as the purchase of the appellants' shares are concerned, it is conceded that the said order was made without any consent or instruction. At the material time, the appellants were not even parties to the petition which was specifically filed by Toh for the purpose of buying him out of the company, in lieu of a declaration by the court that he was still the managing director of the company. Indeed, the appellants had nothing to do with the dispute in the petition and had never instructed anybody to include them or their interests in the consent order. In our judgment, there can be no doubt that the consent order was made without jurisdiction in so far as it binds and affects the appellants. Before the learned judge, the appellants' civil suit to set aside was by order of court consolidated with the respondents' application for execution of the consent order. The parties agreed that the matters in dispute be resolved on the preliminary issue of whether the appellants were estopped from challenging the validity of the consent order.

At the hearing, the respondents had conceded that when the consent order was made, the court had no jurisdiction to make an order binding on the appellants. If the court had no jurisdiction to make the consent order affecting the rights of the appellants, we would have thought that the next point would be to consider whether they were entitled to have it set aside ex debito justitiae. Be that as it may, the learned judge proceeded to hear the preliminary issue and dismissed the appellants' suit to set aside the consent order even to the limited extent that it affected them. He relied on the following speech of Lord Denning in the Privy Council case of *Abuakwa* v *Adanse*[1] at p 101:

> The general rule of law undoubtedly is that no person is to be adversely affected by a judgment in an action to which he was not a party, because of the injustice of deciding an issue against him in his absence. But this general rule admits of two exceptions: one is that a person who is in privity with the parties, a 'privy' as he is called, is bound equally with the parties, in which case he is estopped by res judicata: the other is that a person may have so acted as to preclude himself from challenging the judgment, in which case he is estopped by his conduct.

The appellants were not in privity with the parties to the petition, but the learned judge held that on the evidence, the present case came within the second exception to the general rule. He cited and relied on the judgment of Wigram VC in *Henderson* v *Henderson*[2] at p 115 referred to by the Privy Council in *Yat Tung Investment Co Ltd* v *Dao Heng Bank Ltd & Anor*[3] at p 590. The passage in the judgment relied upon reads:

> ... where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

The learned judge also relied on the principle stated by Lord Penzance in *Wytcherley* v *Andrews*[4] at p 328 to the effect that 'if a person knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he was estopped from litigating the matter afresh.' This principle was applied by the Privy Council in *Abuakwa* v *Adanse*,[1] 'in the absence of technical legal reasons to the contrary'. Such estoppel by conduct may consist in active participation in the previous proceedings, or in obtaining an actual benefit from the judgment in previous proceedings (see *Ee Kim Kin* v *Collector of Land Revenue, Alor Gajah*[5] at p 90), or it may even consist in standing by and watching other parties fight out the battle or at most giving evidence in support of one side or the other.

In this case, apart from the appellants, the petitioner Toh himself was dissatisfied with the validity of the consent order which enabled the directors of the company to purchase his entire 140,000 shares at $1.90 per share. Without joining the appellants as parties, he made two attempts to set aside the order but was unsuccessful. The first application was on 17 December 1984 by summons-in-chambers in the petition which was dismissed by another judge on a procedural ground. The second attempt was by Civil Suit No C 2169/85 which was struck out under O 18 r 19 of the Rules of the High Court 1980 on the

ground that the averments in the statement of claim and the prayer sought were identical to the earlier chamber application. Toh appealed to the Supreme Court against the striking out order but it was summarily dismissed. It was on 12 December 1986 that the appellants took out the present Civil Suit No C 4-22-295 of 1986 seeking for the setting aside of the consent order in so far as it affected them. They cited the present respondents, viz petitioner Toh, the three directors, and the company as defendants. But about a year earlier, on 9 December 1985, pending the disposal of Toh's Civil Suit No C 2169/85, the appellants had also taken out a summons-in-chambers in the originating petition seeking leave to intervene. The court granted them leave on 17 January 1986 whereby for the the first time they became interveners in the petition. It is pertinent to note that there was no appeal against that order. Clearly therefore that both the petitioner Toh and the appellants took separate actions to set aside the consent order, and it cannot be said that the appellants were guilty of standing by and watching Toh fight out the legal battle within the principle laid down by Lord Penzance.

The active participation relied upon by the learned judge as constituting estoppel by conduct had reference firstly to the 1984 summons application by Toh in the originating petition to set aside the consent order on the ground that he had never given instructions to his counsel on the terms of the order. Toh's application was supported by the appellants' joint affidavit in which they confirmed that each one of them was the registered owner of 50,000 shares in the fifth respondent's company, and that they had never given instructions in respect of the consent order. Toh's application was dismissed because according to the learned judge, the consent judgment 'had been perfected and accordingly could not be set aside at the instance of only one of the parties' in the petition. The merit of the application was apparently never adjudicated by the court. The second active participation by the appellants which the learned judge regarded as constituting estoppel by conduct related to another interlocutory application in the petition made by Toh on 9 December 1985 seeking a stay of execution of the consent order pending determination of his Civil Suit No C 2169/85. In this proceeding for stay, the appellants again filed a joint affidavit supporting Toh's application. By lending their support in both the interlocutory applications in the petition, the learned judge ruled that they were estopped by conduct from challenging the validity of the consent order. At p 17 of his judgment, the learned judge came to the following conclusions:

> In my judgment the plaintiffs in CS 22-295-86 went beyond just standing by and watching the issues fought out in CS C2169-85 (which alone according to Lord Denning is sufficient to successfully raise estoppel by conduct). It seems to me clear that they and each of them had directed their minds to the need to have the consent order set aside and had decided initially that the vehicle for obtaining that desired result need only be the application by Toh Seak Keng in the petition and when that failed the Civil Suit C 2169-85 was brought by Toh Seak Keng as plaintiff. There was clearly the intention to use those proceedings and there was active participation by them in each of those proceedings in the affirming of those affidavits by which they moved the court for the desired result.
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> The similar interest that Toh Seak Keng and the said members of his family had were not the shares but having the consent order set aside...

With respect, it is not true that the appellants took active participation in both the petition and Toh's Civil Suit No C 2169/85. The joint affidavits filed by the appellants were both in respect of the petition. The appellants were not involved at all in Toh's civil suit. All along they had been active only in the petition right up to the time when they obtained the order to intervene. It is therefore incorrect for the learned judge to conclude that the appellants intended to use Toh's civil suit for the purpose of setting aside the consent order. There could not be such an intention. The learned judge must be under the wrong impression that one of the interlocutory applications in which the appellants had filed affidavit-in-support was in Toh's civil suit. Hence his erroneous finding that the appellants took active part 'in each of those proceedings' and went beyond standing by and watching the issues fought out in Toh's civil suit which was the basis of his conclusion that there was estoppel by conduct. As stated elsewhere in this judgment, nor did the appellants stand by and watch their rights being fought by Toh, as was the case of the plaintiff in *Abuakwa* v *Adanse*[1] who refused to intervene in a previous land dispute suit in a situation prevalent in West Africa at that time, where parties were in the habit of perjuring themselves to bolster up a land claim by later adducing evidence which had it been in existence, would or should have been adduced at the first trial. Whereas in the present case, pending the hearing of Toh's civil suit, the appellants, independently of Toh, asserted their legal rights to set aside the consent order as far as it affected them, by successfully joining in as interveners in the petition, and by filing subsequently the present civil suit. In our judgment, neither did the appellants take active participation in C/S C 2169/85 and nor were they guilty of standing by and watching the issues affecting them being fought by Toh in that civil suit. We are therefore of the opinion that there is no basis upon which the learned judge could have come to the conclusion that there was estoppel by conduct on the part of the appellants.

There is another reason why the principle of estoppel by conduct should not apply in this particular case. The consent order being a divisible one merely gives the appearance that the interest of Toh and the appellants is the same. For one thing, having the consent order set aside would revive Toh's interest in a declaration that he be restored as the general manager instead of being bought

out by the company. But more importantly, their rights to set aside the consent order are founded on an entirely different basis. Toh was the petitioner in the 1983 proceedings and was represented by counsel at the hearing when the consent order was made, and his case was founded on the fact that he had never given instruction to his counsel on the terms of the consent order. Whereas the appellants were not even parties to the petition and were not given an opportunity to be heard. The merit of the appellants' case has never been adjudicated upon; not even in the two proceedings brought by Toh, which were dismissed on procedural or technical grounds. As far as the appellants are concerned, all the respondents have readily conceded that the consent order was made without jurisdiction, and therefore unlike Toh's case, it is the duty of the court to consider whether the appellants are entitled ex debito justitiae to set aside the consent order. Further, in granting the appellants' application to intervene, the court must have been satisfied that the interest of the appellants and Toh in having the consent order set aside is not the same. Otherwise, there appears to be no purpose in allowing them to intervene after Toh had failed to set aside the order in the first instance. In any event the existence of the order to intervene should constitute a sufficient 'technical legal reason to the contrary' referred to by the Privy Council in *Abuakwa* v *Adanse*,[1] which would prevent the application of the estoppel by conduct exception to the general rule.

On the issue of the appellants' entitlement to set aside the consent order ex debito justitiae, counsel for the respondents seems to argue in his written submission that even an invalid or irregular order made by a superior court must be complied with until the order is stayed or set aside. In *Isaacs* v *Robertson*[6] at p 142, Lord Diplock in delivering the judgment of the Privy Council disagreed with the proposition that disobedience to an interlocutory injunction alleged to be a nullity, could not constitute a contempt of court and his Lordship approved the opinion of Romer LJ in *Hadkinson* v *Hadkinson*[7] at p 569 that a party who knows of an order whether null or void, regular or irregular cannot be permitted to disobey it. They should come to the court and apply to have it discharged. Indeed, this is precisely what the appellants here have done. They have applied by the present civil suit to have the consent order set aside notwithstanding any concession given by both parties to the originating petition that the consent order was invalid and a nullity as far as it affected the appellants. However, in *Isaacs* v *Robertson*,[6] whilst rejecting the existence of a distinction between 'void' and 'voidable' orders for the purpose of complying with the court order, Lord Diplock speaking in the Privy Council at p 143 recognized the existence of a category of orders, even of the court of unlimited jurisdiction which a person affected by the order is entitled to set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deal expressly with proceedings to set aside for irregularity and give to the judge a discretion as to the order he will make. The definition of defects that bring an order into the category that attracts ex debito justitiae has not been finally defined save, according to Lord Diplock, 'that it includes orders that have been obtained in breach of the rules of natural justice'.

It should be emphasized that the principle stated by Lord Penzance in *Wytcherley* v *Andrews*[4] and applied in *Abuakwa* v *Adanse*,[1] relating to estoppel by conduct as a special exception to the cardinal rule of natural justice that a party must be given an opportunity to be heard before he is adversely affected, is founded on justice and common sense. It should therefore never be applied except in the cause of justice and in a clear situation where a person in the same interest had the opportunity to be a party or to intervene but failed to do so. It is certainly inapplicable where an aggrieved party is entitled to a remedy ex debito justitiae.

In our view the defects in the present consent order are such that the appellants are entitled to have it set aside ex debito justitiae as far as it affected them. There is no denial that in breach of the rules of natural justice, the High Court had no jurisdiction to make the consent order affecting the rights of the appellants. In our view, if the learned judge had directed his mind on the proper exercise of the inherent jurisdiction of the court, he would have exercised it in favour of the appellants and he would have ordered the consent order as far as it affected their shares in the company to be discharged.

For the above reasons, we find the appellants are not estopped from challenging the validity of the consent order. The appeal is accordingly allowed with costs both here and in the court below. The order of the High Court is accordingly set aside and be substituted with an order that the consent order dated 3 October 1983 be set aside as far as it affects or binds the appellants. To that extent, the order of execution granted to the respondents must also be varied. The deposit is refunded to the appellants.

Appeal allowed.

Solicitors: *Cheang & Ariff; Fernandez & Co.*

Reported by *Prof Ahmad Ibrahim*